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No. 92-1055

In The Supreme Court Of The United States

October Term, 1992

WILLIAM H. SHOCKEY,

Petitioner,

v.

CITY OF PORTLAND, a municipal corporation; JACK C. IRVIN, individually and in his official capacity; and JOHN LANG, individually and in his official capacity,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, William H. Shockey, pursuant to Sup.Ct.R. 15.6, hereby submits

his Reply Brief in support of his Petition for a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of the State of Oregon entered on September 21, 1992.

REPLY ARGUMENT

1. Petitioner's Petition For Certiorari Was Timely Filed Measured From The Only Entry Of Judgment In The Lower Court.

Respondents argue that Petitioner's Petition for writ of certiorari was not timely filed, because under Supreme Court Rule (hereafter "Rule") 13.4 time for filing began to run at the denial of Respondents' petition for reconsideration. Respondents support their argument by asserting that the entry of judgment in this case, which occurred after the denial of Respondents' petition for reconsideration, is the local equivalent of the issuance of mandate and therefore not the

proper date from which to measure the time to file a petition for writ of certiorari. Respondents' argument ignores the statutory basis for this Court's jurisdiction, the plain language of Rule 13, and is contrary to this Court's precedents.

Rule 13.1 provides:

> A petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort *** shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. (Emphasis supplied).[1]

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[1] Rule 13.1 provides:

A petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

The language of the Rule parallels the statutory requirement established in 28 U.S.C. § 2101(c). The statute provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C.A § 2101(c) (emphasis supplied). Thus, under both Rule 13.1 and the jurisdictional statute the proper time within which to file a petition for writ of certiorari runs from the entry of judgment.

There is no dispute in this case as to whether the entry of judgment was made on September 21, 1992. See Respondents' Brief In Opposition To Petition For Certiorari (hereafter "Respondents' Brief") at 8, 10. There was no prior entry of judgment. Respondents agree that the Oregon Supreme

Court's "decision" was filed on July 9, 1992 and that "the appellate judgment was entered on September 21, 1992." Respondent's Brief at 8. Since this is the only entry of judgment in this case in the Oregon Supreme Court, it is the date from which the time for filing a petition for writ of certiorari runs. 28 U.S.C. § 2101(c); Rule 13.1. Measured from September 21, 1992 Petitioner had until December 20, 1992 in which to file his petition for writ of certiorari. The petition for writ of certiorari was filed on December 15, 1992 and was thus within 90 days from the entry of judgment.

Respondents argue that under Rule 13.4[2] the time in which to file is measured from the date of denial of the petition for reconsideration unless the subsequent entry of judgment follows a granting of the petition for rehearing. Respondents' Brief at 9-10. Such a reading may be appropriate if a prior judgment had been entered. See Missouri v. Jenkins, 495 U.S. 33, 45, 110

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[2] Rule 13.4 provides:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

S.Ct. 1651, 109 L.Ed.2d 31 (1990). However, where no prior judgment had been entered, as in this case, Respondents' reading of Rule 13.4 would be contrary to the requirements of Rule 13.1 and 28 U.S.C. § 2101(c) (measured from entry of judgment).

Reading Rule 13 as a whole, the time for filing a petition for writ of certiorari is from the entry of judgment. Rule 13.1. If a petition for rehearing is filed after the entry of judgment, the time for filing runs from the denial of the petition for rehearing; or, if the petition for rehearing is granted from the subsequent entry of judgment. Rule 13.4; Missouri v. Jenkins, supra, 495 U.S. at 45. However, if a petition for rehearing is filed before the entry of judgment the time for filing runs from "the entry of a subsequent judgment." Rule 13.4; Marquette Nat. Bank v. First Omaha Corp., 439 U.S.

299, 307 fn. 18, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978). In the present case, Respondents' petition for reconsideration was filed before the entry of judgment and, therefore, the entry of judgment controls rather than the denial for reconsideration.

Respondents argue that "[e]ntry of the appellate judgment in this case is the local equivalent of the issuance of mandate[,]" and therefore under Rule 13.4 it is incorrect to measure the time for filing a petition for certiorari from the entry of the appellate judgment. Respondents' Brief at 12. Several problems with this argument exist. First, under Respondents' argument Rule 13.4 would in this case negate the statutory requirement to measure from the date of entry of judgment. 28 U.S.C. § 2101(c).

Second, the argument ignores the exception in Rule 13.4 presented immediately after the language Respondents rely upon:

> However, if a petition for rehearing is timely filed *** the time for filing the petition for a writ of certiorari *** runs from the date of denial of the petition for rehearing or the entry of a subsequent judgment.

Rule 13.4. Under Respondents' own authority, since a petition for reconsideration was filed in this case the question of the issuance of a mandate or its local equivalent is not controlling. Rather, the exception which applies when a petition for rehearing is filed controls. The only entry of a judgment in this case is also a "subsequent judgment," filed after the denial of the petition for reconsideration. Therefore, under Rule 13.4 the time for filing a petition for certiorari runs from the entry of the subsequent judgment - September 21, 1992.

Finally, Respondents' entire untimely filing argument is contrary to this Court's precedent. In a case very similar to this

one, this Court rejected respondent's argument that the petitions were untimely. Marquette Nat. Bank v. First of Omaha Corp., supra, 439 U.S. at 307 fn. 18. In Marquette Nat. Bank, the opinion of the Minnesota Supreme Court was filed and a timely petition for rehearing was subsequently filed. The petition for rehearing was denied and judgment was subsequently entered, "by way of a separate document ...." Petitions for certiorari were filed within 90 days measured from entry of judgment by the separate document and this Court ruled that they were timely. Marquette Nat. Bank, 439 U.S. at 307 fn. 18. In the present case, the opinion of the Oregon Supreme Court was filed on July 9, 1992, and then a timely petition for rehearing was filed and denied and finally a judgment was entered, on September 21, 1992, by the separate document entitled "Appellate Judgment." Appendix 88a-90a.

Following Marquette Nat. Bank, this petition for certiorari was timely filed within 90 days after entry of judgment. See also Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 24-25, 44 S.Ct. 261, 68 L.Ed. 541 (1924) (time to file measured from the formal entry of judgment and not from the filing of the written decision); Commissioner v. Estate of Bedford, 325 U.S. 283, 284-288, 65 S.Ct. 1157, 89 L.Ed. 1611 (1945) (time to file measured from entry of "Order of Mandate" not from filing of written opinion); Scofield v. NLRB, 394 U.S. 423, 427, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1968) (petition for certiorari was timely filed measured from the entry of a decree, where the prior filed opinion concluded that "upon presentation, an appropriate decree will be entered").

Respondents' authorities are not to the contrary. In all of Respondents' authorities there was a judgment entered

prior to the petition for rehearing (or an equivalent petition), and a second judgment entered after the petition for rehearing. In all three cases Respondent relies upon, this Court held the petition for rehearing only tolled the start of the period in which a petition for certiorari must be sought based upon the first judgment entered. Missouri v. Jenkins, supra, 495 U.S. at 45; see Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 445-46, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974); F.T.C. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 213, 73 S.Ct. 245, 97 L.Ed.2d 245 (1952). In F.T.C., supra, this Court reasoned that only if the second judgment "changes matters of substance" should the period in which to petition for certiorari "begin to run anew." F.T.C., supra, 344 U.S. at 211-12. Likewise, in Missouri v. Jenkins, supra, this Court reasoned that a petition for rehearing operates to suspend

the finality of the court's prior judgment. Missouri, supra, 495 U.S. at 46; see Communist Party of Indiana, supra, 414 U.S. at 445 (motion for reconsideration suspended finality of previous judgment). In the present case there is no previous judgment to suspend or change. Likewise, without a previous judgment there is no period within which to petition that can be tolled. In this case, the only judgment is the appellate judgment entered September 21, 1992. Therefore, all of Respondents' authorities are distinguishable.[3]

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[3] Respondents also cite Commissioner v. Estate of Bedford, supra, 325 U.S. 283. Contrary to Respondents' assertion Bedford is not "obviated" by Rule 13.4. Respondents' Brief at 15 fn. 2. Rather, Bedford supports Petitioner's position that the time to file for certiorari is measured from the entry of judgment not the filing of the lower court's written opinion. Estate of Bradford, supra, 325 U.S. at 284-88 (in spite of its title, the "Order for Mandate" fulfills the function of a judgment order, the court's prior written opinion does not).

In sum, the petition for writ of certiorari was timely pursuant to 28 U.S.C. § 2101(c); Rule 13; and Marquette Nat. Bank, supra.

2. Review By This Court May Substantially Effect The Outcome Of The Litigation.

The trial court granted a directed verdict on Petitioner's wrongful discharge and § 1983 claims in this case after Petitioner had rested his case. Significantly, although the trial court allowed the remaining claim of intentional interference with economic relations to go to trial, the court struck any reference in the claim to Petitioner's right of free speech. Respondents argue that this action is inconsequential essentially because this case never really involved more than an intentional interference claim and the jury awarded no damages on that claim. Respondents' Brief at 20-22. Respondents' argument is unpersuasive because it

presumes to know how a jury would decide a claim upon a different set of instructions. That other set of instructions would have referenced Plaintiff's free speech violation contentions, and would have afforded the jury the opportunity to decide the case taking into account asserted violations of other legally protected rights. Respondents can only speculate that such a narrowing of the issues did not affect the jury.

By eliminating the § 1983 claim the trial court eliminated a basis for an award of punitive damages against Defendants Lang and Irwin, as officials of the City of Portland. Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). The directed verdict also eliminated the only possibility of an award of attorneys' fees to Petitioner. 42 U.S.C. § 1988; Texas State Teachers Association v. Garland Independent School

District, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989).

Finally, Respondents' argument that Petitioner admitted his petition did not concern the public at all is an inaccurate reading of Petitioner's statement, especially when read in context. In context Petitioner was being questioned about the circulation of the petition itself, not its content, as indicated by the question which preceded the one cited by Respondents as telling:

> Q. Turning to the petition that you circulated. You did not circulate that petition to the public; did you?
>
> A. No.
>
> Q. In fact, it didn't concern the public at all; did it?
>
> A. No.

Tr. 262-63.

In that context, the first question sought an admission that Petitioner had not circulated the petition to the public. Of

course he had not because it was an employee petition. So that when the second question was asked: "In fact, it didn't concern the public at all, did it?" the indefinite pronoun "it" could well have been taken to refer to the subject that had just been discussed, the circulation of an employee petition, rather than the broader question of whether any issue it raised touched upon a matter of public concern. It should be noted that Respondent did not ask the question directly, and it can be presumed that the carefully crafted order of these questions were designed to produce a self serving result. Given this context, this testimony has no bearing on whether the content of the petition addresses a matter of public concern. Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979) (right of freedom of

speech not lost when public employee "arranges to communicate privately with his employer rather than to spread his views before the public").

CONCLUSION

The petition for writ of certoriari was timely filed and none of the reasons presented by Respondents to deny the writ are persuasive. Therefore, for the reasons set forth in Petitioner's petition for writ of certiorari, Petitioner prays that a writ of certiorari be issued to review the Judgment and Opinion of the Supreme Court of the State of Oregon.

Respectfully submitted,

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